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March 15, 2012

### **VIA E-FILE**

Mr. Lester A. Heltzer Executive Secretary National Labor Relations Board 1099 14<sup>th</sup> Street N.W. Washington, DC 20570-0001

Re: Community Options NY, Inc. Case No. 29-RD-066106

Dear Mr. Heltzer:

We are the attorneys for Community Options NY, Inc. ("Community Options" or "Employer") in the above matter. We submit this reply brief in reply to exceptions filed by Community and Social Agency Employees' Union, District Council 1707 AFSCME's ("DC 1707" or "Union") to the Hearing Officer's Report and Recommendations On Objections ("Hearing Officer's Report") issued February 23, 2012 by Hearing Officer Tracy Belfiore, and in support of the Hearing Officer's Report. The Hearing Officer held that the Union's waiver of the employees' obligation to pay dues and initiation fees constituted objectionable conduct. We agree with the Hearing Officer's conclusion and urge the Board to adopt her recommendations on objections.

## I. FACTS.

The facts have been correctly presented in the Hearing Officer's Report and the Employer brief to the Hearing Officer, and need not be repeated here.

## II. THE UNION'S CONDUCT CONSTITUTED OBJECTIONABLE CONDUCT.

The Union's promise and granting of a waiver of dues and initiation fees shortly after the filing of the decertification petition and the scheduling of a National Labor Relations Board ("NLRB") election, and just prior to the date of the election, was objectionable. The Hearing Officer correctly used the "tendency to influence test" established in <u>Owens-Illinois</u>, 271 NLRB 1235 (1984), to find the Union's conduct interfered with the election. Contrary to the Union's assertion, the "Savair doctrine" enunciated in <u>NLRB v. Savair Mfg. Co.</u>, 414 U.S. 270 (1973), does not apply to this situation.



### A. The Union's Waiver Affected The Results of the Election.

The Union's waiver clearly had a tendency to influence the vote in the election. The Union granted the waiver at the time the employees ratified the collective bargaining agreement between the Employer and the Union. This was after the NLRB election had been scheduled and just prior to the election date. Although there was testimony that Union representatives announced the waiver at the ratification meeting, employee witnesses who attended the ratification all testified they were not told of the waiver at that meeting. Instead, they testified they first learned of the waiver after the ratification and before the election, either through Union flyers or being told of the waiver by Union business agents.

An examination of the Union's flyers indicate that the waiver of dues payments and fees related to a current obligation to which employees were subject. Employee witnesses stated accordingly that the obligation to pay dues and fees already had attached upon the contract's ratification and, absent the waiver, they presently were obligated to pay them. The Union's flyers did nothing to change that impression despite the Union's later argument that the union security clause of the collective bargaining agreement implies otherwise. In fact, most of the employees who testified stated they never read the Union security clause. Thus, it is clear that the Union's flyers did nothing to dispel the employees understanding that they had a present obligation to pay dues and that the Union's waiver was made in exchange for the employees' vote in the Board election. This is an impermissible interference in the election process,

# B. The Union Granted The Waiver To Influence The Election.

The Union's <u>post hoc</u> rationalizations for granting the waiver do not withstand scrutiny. There can be no doubt the Union granted the waiver to win votes in the upcoming Board election. It was tantamount to a grant of benefits, since it also put money in employees' pockets they otherwise would not have had. The Union's flyers and the timing of the waiver point unmistakably to the fact that the waiver was granted to influence the election.

The Union's arguments that the waiver was granted due to poor economic times and the smaller-than-desired wage increases negotiated by the Union do not explain the timing of this waiver. It is undisputed that bad economic times have been in existence for the past three years. This, however, did not prompt the Union to announce the waiver any sooner than was necessary to influence employee votes. Similarly, the Union's second argument, that the waiver was granted because of the small wage increase negotiated, lacks credibility. The parties reached agreement on wage increases in July 2011, three months prior to the Union's announcement of the waiver. The Union was aware of employee concern over dues and fees payments as the issue was discussed by the Union's bargaining committee on the same day the wage increases were agreed to by the parties. Nevertheless, the waiver was not announced until three months later and only in light of the filing of a Board petition and the scheduling of a Board election. The waiver was made to secure votes in the Board election. Indeed, the Union's rationales support the view that the waiver was intended to and did confer a benefit immediately before the balloting. This is objectionable conduct.

The Union does not contest the fact that the value of the waiver was substantial enough to interfere with the election.



### C. The Union's Savair Argument Is Misplaced.

The Union's argument that the "Savair doctrine" controls this case is incorrect. In NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973), the Court held the selective grant of a waiver of initiation fees only to those who signed Union authorization cards prior to a representation election was objectionable conduct. The Board and courts subsequently have held that an unconditional waiver of dues and fees is not necessarily objectionable in an organizing context. See L.D. McFarland Company, 219 NLRB 575 (1975); S and S Product Engineering Services, Inc., 210 NLRB 912 (1974); Prudential Insurance Co., 215 NLRB 66 (1974). The difference between these cases and the instant case is that under the former, the waiver relates only to a future obligation. In the above cases, at the time the waiver was made, the employees had no legal obligation to pay the union any dues or fees, and the possibility of having to do so in the future is speculative. Even so, conditioning the waiver in a way calculated to affect their union activity may be faulted, as the Supreme Court made clear. In the instant case, by contrast, the obligation to pay dues and fees already had attached at the time the waiver was granted. The relief granted was definite, tangible and calculable.

Further, in the instant case, the ratification of the collective bargaining agreement made the employees <u>legally obligated</u> to pay dues and initiation fees. Whether, as the employees believed, the obligation was immediate, or, as argued by the Union, deferred for 31 days, there is no question but that the employees had a binding obligation to pay money to the Union. But the Union's tactically-timed waiver changed that.

The Board consistently has held that a union cannot make, or promise to make, a gift of tangible economic value in order to induce employees to support it in a representation election. Go Ahead North America, LLC, 357 NLRB No. 18 (2011); Mailing Services, 293 NLRB 565 (1989); Flatbush Manor Care Center, 287 NLRB 457 (1987). Here the Union did just that. It promised and granted the employees a tangible and substantial monetary benefit to secure their vote in the Board election. The Union's actions were objectionable, and warrant a recession of their conduct and a new election.

### III. CONCLUSION.

The Employer maintains for all the reasons cited above the Union engaged in objectionable conduct as found in the Hearing Officer's Report and urges the Board to adopt the Hearing Officer's conclusions and recommendations and direct a new election be held.

Very truly yours,

JACKSON LEWIS LLP

Steven S. Goodman



### **CERTIFICATE OF SERVICE**

I hereby certify that on the 15<sup>th</sup> day of March, 2012, I caused a true and correct copy of REPLY BRIEF IN REPLY TO EXCEPTIONS to be served upon all interested parties, via email and e-filing to the Acting Regional Director, addressed to:

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Dated: Melville, New York March 15, 2012